Filed 1/11/19 In re L.D. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re L.D. et al., Persons Coming Under the Juvenile Court Law.	
KINGS COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. SUZANNE G., Defendant and Appellant.	F077977 (Super. Ct. Nos. 17JD0088, 17JD0089) **OPINION**

THE COURT[*]

APPEAL from orders of the Superior Court of Kings County. Jennifer Lee Giuliani, Judge.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant.

Colleen Carlson, County Counsel, and Risé A. Donlon, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Meehan, J. and Snauffer, J.

INTRODUCTION

Appellant Suzanne G.'s (mother's) children, L.D. and S.G., were removed from her custody and placed with maternal relatives in Texas after reunification services were terminated. Welfare and Institutions Code[1] section 388 petitions were filed by mother and heard at the same time as the section 366.26 hearing to terminate parental rights and set a permanent plan of adoption. The juvenile court denied the section 388 petitions, terminated mother's parental rights, and set a permanent plan of adoption for both girls.

Mother appeals, contending the juvenile court abused its discretion when it denied her section 388 petitions and erred in failing to find the beneficial parent-child exception set forth in section 366.26, subdivision (c)(1)(B)(i) applied. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

A section 300 petition was filed on behalf of L.D., then seven years old, and S.G., then 22 months old, on May 16, 2017. The petition alleged there was a substantial risk the children would suffer serious physical harm or illness because of mother's failure to protect and adequately supervise the children. On or about May 13, 2017, mother had left the two girls home alone without supervision. Mother was found by law enforcement; she was under the influence of a controlled substance and engaging in a physical altercation.

The detention report stated that both children had been placed in a licensed foster care facility. L.D.'s father, Richard D., informed the social worker there were current custody orders pertaining to L.D. that had been issued by a court in Texas. Richard was residing in Texas. S.G.'s father, Rafael G., apparently was in custody, as the social worker indicated he was going to appear by court call for the hearing.[2]

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[1] References to code sections are to the Welfare and Institutions Code unless otherwise specified.

[2] Neither father is a party to this appeal.

The social worker found no prior history of juvenile dependency proceedings in California. Mother reported that there was a history with the juvenile dependency court in Texas. When the social worker interviewed mother, she stated, "this is all my husband's fault" multiple times. Mother jumped quickly from topic to topic, was "venting," and did not allow the social worker to speak.

Richard reported that L.D. had been born in Texas and lived in Texas for about three years. Four years ago, mother left Texas with L.D. and maintained only sporadic contact with Richard. Mother confirmed with the social worker that she and her "girls" had been in California about four years.

At the May 17, 2017 detention hearing, it was determined that mother and Rafael were married in Texas in 2013. The juvenile court found Richard to be the presumed father of L.D. and Rafael to be the presumed father of S.G.

The juvenile court found that a prima facie case had been established that the children came within the provisions of section 300, subdivision (b), in that mother left the children home alone and was subsequently found by law enforcement under the influence of a controlled substance. The juvenile court ordered the children removed from mother's custody. The agency was given discretion to place the children with their respective presumed fathers "upon favorable assessment for placement."

A jurisdiction report was filed July 2, 2017. On August 28, 2013, mother was arrested in Texas for possession of methamphetamine and placed on probation. The agency had received information from the Texas Department of Family and Protective Services (DFPS) reflecting that L.D. had been placed under the protection of DFPS, with mother to have supervised visits with L.D. and attend parenting and counseling classes. On February 24, 2014, when mother completed her classes and tested negative for controlled substances, L.D. was returned to her custody. There had been other reports to DFPS, which had been ruled out, unable to be determined, or found to be unfounded.

Mother had charges pending against her in California for violating Health and Safety Code section 11550, being under the influence of a controlled substance, and for child endangerment. When mother was arrested in California and her children taken into protective custody, she had to be placed in a detoxification room for six hours before she could be questioned.

The jurisdiction report noted the maternal aunt and maternal grandmother in Texas had both expressed interest in accepting placement of the children.

When the social worker interviewed mother, mother stated, "I am glad they locked me up because I am going to kill someone. I am so angry. I got hatred in my heart. … This is [f*****] up. I'm tired and exhausted, everyone is trying to hurt me and set me up and I am tired of this [s***]." Mother claimed to be a "[f******] princess" from Malaysia; used derogatory terms to describe her ex-husband; and considered her sisters to be "[f******] prostitutes." When asked about her drug use, mother claimed she had not used drugs in three years.

Mother was asked with whom she would like her children to be placed and she responded, "Not with any of my [f******] relatives." Mother went on to state she wanted her children placed with "a rich white family, so they are well taken care of until I can get myself together and come get them."

At the jurisdiction and disposition hearing on June 21, 2017, it was noted that Texas had relinquished jurisdiction over the children and California was prepared to proceed. The agency noted that it had concluded it would be detrimental to place the children with their fathers at this time because Richard had not had L.D. in his care for over three years and Rafael had not had S.G. in his care since she was three months old. The juvenile court noted that, "we place in people's homes that are strangers to children all the time," and wanted more information before making a detriment finding.

Mother signed a waiver of rights form, indicating she was submitting the matter based upon the social worker's report and other documents. The juvenile court found

that California had jurisdiction pursuant to Family Code section 3421, subdivision (a)(3) and Texas relinquished jurisdiction pursuant to Family Code section 3421, subdivision (a)(2). The juvenile court found the allegations of the petition to be true, assumed jurisdiction over the children, and declared the children dependents of the juvenile court.

The continued disposition hearing was set for July 12, 2017. The addendum report filed July 10, 2017, noted that mother apparently was no longer at the address which she had provided the agency and had not provided the agency with a new address or contact information. The social worker was unable to contact Rafael to conduct an assessment for placement.

The agency received information revealing that Richard had a criminal history in Texas. The social worker spoke with L.D. and asked the child with whom she would like to live, L.D. responded that she wanted to live with her maternal grandmother and not her father. The agency recommended that neither child be placed with her respective father.

At the continued disposition hearing on July 12, 2017, the agency's recommendation was to offer family reunification to all parents. The juvenile court found that there was clear and convincing evidence of a substantial danger to the children if placed in mother's custody and that placement of the children with their respective fathers would be detrimental. The court found that mother had not begun her case plan services. Mother apparently was incarcerated in the local jail.

The juvenile court ordered that family reunification services be provided to mother and both fathers. Mother was to be provided with supervised visitation with the children. The juvenile court informed mother that because one of her children was under three years of age, she may only have six months to reunify.

On November 9, 2017, there was a hearing on a request for expedited orders to assess three out-of-state relatives for possible placement of the children. The request was granted. It was noted that mother was in custody and not present, but her counsel was present.

On December 13, 2017, it was reported that the assessment of relatives in Texas for possible placement was preliminarily approved. The maternal grandmother was undergoing a home study.

The status review report filed December 22, 2017, noted that mother was incarcerated in the state prison in Chowchilla. Mother had been arrested on June 23, 2017, on charges of criminal threats and assault with a deadly weapon. Mother was sentenced to two years in state prison on the assault with a deadly weapon charge. Mother had not enrolled in or completed any of the components of her case plan. She apparently was unable to complete her plan because of her incarceration.

At the January 3, 2018 six-month review hearing, the recommendation was to terminate services to all parents. Mother had signed a waiver, indicating she did not wish to be transported for the hearing. Mother's counsel submitted based on the report. The matter was continued, however, to January 17, 2018.

At the continued hearing on January 17, 2018, mother's counsel again submitted on the report. The juvenile court adopted the agency's recommendations and proposed findings. The juvenile court found that reasonable services had been offered mother; mother had made minimal progress toward alleviating the conditions that gave rise to the dependency; and reunification services for mother were terminated. Services to both fathers also were terminated. The agency was directed to schedule a section 366.26 hearing.

Mother filed section 388 petitions on April 9, 2018, seeking to modify the prior orders regarding S.G. and L.D. Mother stated she had a new parole date of April 17, 2018, and did not want her parental rights terminated. Mother opined that granting the section 388 petitions was in the best interests of the children because she and the children were bonded.

On June 6, 2018, a combined hearing on the section 366.26 termination of parental rights and selection of a permanent plan and the section 388 petitions was scheduled. At

that time, the juvenile court found that out-of-state placement of the children was the most appropriate placement and was in their best interests. The children were ordered placed in Texas. Both matters were continued for a contested hearing.

The agency filed an addendum report for the contested hearing on July 13, 2018, noting that mother had supervised visits with the children after her release from custody. Mother was affectionate with the children and the children seemed excited to see her. After the children were placed in Texas, mother kept in touch via Skype and phone calls.

The maternal aunt was interested in adopting both children and was identified by the agency as the prospective adoptive parent. The maternal aunt had been cleared for placement and adoption. The children had been in their maternal aunt's care in Texas and had bonded with her.

Mother was currently residing in an inpatient treatment program. She had completed eight weeks of her parenting program and was expected to complete the course in September 2018. Mother had completed part of her anger management courses and was expected to fully complete the course in July 2018. Mother's expected completion date for substance abuse classes was December 2018. Mother had undergone a mental health screening and was recommended to participate in dialectical behavior therapy, with an expected completion date around May 2019.

Mother had been released on parole and was in full compliance with the conditions of parole. There was a protective order in effect from July 13, 2017, for three years, protecting the victims of mother's assault for which she had been incarcerated.

At the July 17, 2018 contested hearing, mother was present with counsel. No evidence was presented at the hearing. The agency argued that mother had not shown a change in circumstances that warranted granting the section 388 petitions. The agency opined that mother was making progress, but still had several classes she had not completed. The agency asked the juvenile court to proceed to terminate parental rights

and set a permanent plan of adoption. Counsel for the minors asked the court to follow the agency's recommendation.

Regarding the section 388 petitions, the juvenile court noted that it had to find changed circumstances and that granting the petitions would be in the best interests of the children. The juvenile court found that mother had changing circumstances, not changed circumstances, because mother was still participating in treatment and counseling. The section 388 petitions were denied.

The juvenile court found that the children were likely to be adopted. The juvenile court found that mother's claim of a "strong bond" with her children, and the social worker's noting her visits with the children were positive, was not sufficient to establish the beneficial relationship exception or overcome the preference for stability and permanency offered by adoption. The juvenile court terminated parental rights.

Mother filed an amended notice of appeal on August 29, 2018.

DISCUSSION

Mother contends the juvenile court abused its discretion when it denied her section 388 petitions. Mother also contends the juvenile court erred when it failed to find the beneficial parent-child exception set forth in section 366.26, subdivision (c)(1)(B)(i) applied and terminated parental rights.

I. Section 388 Petitions

Section 388 allows a parent to petition the juvenile court to set aside, modify, or change any prior order of the court. The petition must state in concise language any new evidence or change of circumstances that allegedly require the change of order. (§ 388, subd. (a)(1).) In reviewing mother's section 388 petitions, she never states what order she wants changed, modified, or set aside. Mother's section 388 petitions state she does not want her parental rights terminated, an order which had yet to be made, and instead wants the children placed in a legal guardianship. Mother does not set forth any change of circumstances in the section 388 petitions.

Mother contends the juvenile court abused its discretion in denying her section 388 petitions. We disagree.

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] The parent bears the burden to show both a legitimate change of circumstances and that undoing the prior order would be in the best interest of the child." (*In re A.A.* (2012) 203 Cal.App.4th 597, 611-612.)

"A petition for modification is 'committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established.' " (*In re A.R.* (2015) 235 Cal.App.4th 1102, 1116-1117.)

"Not every change in circumstance can justify modification of a prior order. [Citation.] The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate. [Citations.] In other words, the problem that initially brought the child within the dependency system must be removed or ameliorated. [Citations.] The change in circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged order." (*In re A.A.*, *supra*, 203 Cal.App.4th at p. 612.)

Section 388 serves as an " 'escape mechanism' when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.) It is not enough for a parent to show an incomplete reformation or that he or she is in the process of changing the circumstances, which led to the dependency. "After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability.' " (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*).) "A court hearing a motion for

change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*Ibid.*) " 'A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent ... might be able to reunify at some future point, does not promote stability for the child or the child's best interests.' " (*In re Mary G.* (2007) 151 Cal.App.4th 184, 206.)

" 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' " (*Stephanie M., supra*, 7 Cal.4th at pp. 318-319.) " 'The denial of a section 388 motion rarely merits reversal as an abuse of discretion.' " (*In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.)

The trial court ordered that mother be provided reunification services. The juvenile court informed mother at the July 2017 hearing that because one of her children was under three years of age, she may only have six months to reunify. By December 22, 2017, five months later, mother was incarcerated in the state prison in Chowchilla; she had been sentenced to two years in prison after being convicted of assault with a deadly weapon. Mother had not enrolled in or completed any of the components of her case plan.

When mother filed her section 388 petitions in April 2018, mother had not completed her case plan components, nearly nine months after mother was informed she should complete her case plan in six months. At the July 17, 2018, contested hearing on the section 388 petitions, a year after reunification services were ordered provided, mother still had not completed the components of her case plan. Mother had not completed the parenting program, substance abuse treatment, or the dialectical behavior therapy.

Mother had been involved with child protective services in Texas because of her substance abuse. The current section 300 petition was filed in part because of mother's substance abuse. After the filing of the section 300 petition, mother engaged in criminal activity that resulted in a prison sentence. By the time of the hearing on the section 388 petitions, mother was in transitional housing in an inpatient setting.

The juvenile court found mother failed to make the requisite showing that her circumstances had changed as of the date of the hearing on the section 388 petitions and we concur. Given mother's history of substance abuse; her failure to maintain sobriety and adequately supervise her children after Texas authorities intervened as demonstrated by the filing of the section 300 petition in California; her failure to make reunification with her children a priority as demonstrated by her engagement in criminal activity that resulted in a prison sentence; and her failure to complete the components of her case plan one year after reunification services were ordered, she has not demonstrated changed circumstances. In the context of the dependency proceeding for L.D. and S.G., mother's efforts at best demonstrated changing, but not changed, circumstances.

Our conclusion that the juvenile court did not err in finding mother failed to establish a change in circumstances obviates the need to address the children's best interests in the context of the section 388 petitions. We find no abuse of discretion on the part of the juvenile court in denying mother's section 388 petitions.

II. Beneficial Parent-Child Relationship Exception

We next consider mother's claim that a beneficial parent-child relationship existed, and that legal guardianship and not adoption should have been the permanent plan.

After reunification services are terminated, " 'the focus shifts to the needs of the child for permanency and stability.' " (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) A hearing under section 366.26 is held to design and implement a permanent plan for the child. At a section 366.26 hearing, once the juvenile court finds by clear and convincing

evidence that the child is likely to be adopted within a reasonable time, the court is required to terminate parental rights and select adoption as the permanent plan, unless the parent shows that termination of parental rights would be detrimental to the child under one of several statutory exceptions. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.)

"Under section 366.26, the statutory preference is to terminate parental rights and order the child placed for adoption. (§ 366.26, subd. (b)(1).)" (*In re C.B.* (2010) 190 Cal.App.4th 102, 121.) There are statutory exceptions that " 'permit the court, in *exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption.' " (*Id*. at p. 122, fn. omitted.) One such statutory exception to adoption applies where "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) As the statutory language shows, there are two prongs to the exception: (1) regular visitation and contact; and (2) a beneficial parent-child relationship.

"Satisfying the second prong requires the parent to prove that 'severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed. [Citations.] A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent.' " (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643.)

In order for the exception to apply, the parent-child relationship must "promote[] the well-being of the child *to such a degree as to outweigh* the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, *positive*

emotional attachment such that the child would be *greatly* harmed, the preference for adoption is overcome and the natural parent's rights are not terminated. [¶] Interaction between natural parent and child will always confer *some* incidental benefit to the child." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*).) (Italics added.)

Mother bears the burden of showing the exception applies. (*In re Noah G.* (2016) 247 Cal.App.4th 1292, 1300.) "[I]t is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*); see *In re Celine R., supra,* 31 Cal.4th at p. 53.)

The parent-child relationship exception "does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent." (*Jasmine D., supra,* 78 Cal.App.4th at p. 1348.) "[A] child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent." (*Id.* at p. 1350.) Even a "loving and happy relationship" with a parent does not necessarily establish the statutory exception. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419.)

In determining whether the relationship between parent and child is beneficial, we look to such factors as "(1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467, fn. omitted.) The juvenile court's conclusion that mother did not satisfy the exception "turns on a failure of proof at trial, [such that] the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

The juvenile court's conclusion that severing the parent-child relationship in this situation would not deprive L.D. or S.G. of a substantial, positive emotional relationship such that they would be greatly harmed did not exceed the bounds of reason. (*Autumn H., supra*, 27 Cal.App.4th at p. 575; *Stephanie M., supra*, 7 Cal.4th at pp. 318-319.) L.D. was not in mother's custody for a period of time in Texas, then both L.D. and S.G. were removed from mother's custody a few years after arriving in California. They remained out of mother's custody for a period of approximately 14 months between the detention hearing and the section 366.26 hearing. The oldest girl, L.D., was seven years old at the filing of the petition; S.G. was 22 months. Thus, S.G. had spent a significant portion of her life out of mother's custody and L.D. had been out of mother's custody for two significant periods of time during her short life.

Mother details the positive interaction with her children during the supervised visitation that was granted after the section 300 petition was filed. Mother has occupied the role of a friendly visitor, not a parental role, in the lives of L.D. and S.G. for the duration of the dependency proceeding, which was approximately 14 months. The caregivers and prospective adoptive parent have been filling the parental role. That mother did not have custody of her children and was not in a parental role is largely due to her own actions in engaging in substance abuse and criminal activity.

While interaction with mother may confer some benefit on the children, a loving and happy relationship does not necessarily establish the statutory exception and defeat the preference for adoption. (See *In re Beatrice M., supra,* 29 Cal.App.4th at p. 1419.) There is no evidence of a substantial, positive emotional attachment between mother and L.D. and S.G., such that the children would be greatly harmed by severing the parental relationship. (*Autumn H., supra*, 27 Cal.App.4th at p. 575.)

Mother has failed to demonstrate that L.D. or S.G. would suffer any detriment as a result of terminating her parental rights. In fact, the evidence demonstrates that the children will benefit by being adopted into a loving home. The children are happy with

and bonded to the prospective adoptive parent. Adoption allows the children to achieve permanency and stability in a family setting that is free of substance abuse issues and criminal activity. Mother has not produced evidence establishing that this is that rare and extraordinary case where preserving parental rights should prevail over the Legislature's preference for adoption. (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) Accordingly, we find the juvenile court did not err in rejecting the beneficial parent-child exception to adoption.

DISPOSITION

The orders denying mother's section 388 petitions, terminating parental rights, and setting a permanent plan of adoption for L.D. and S.G. are affirmed.